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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ROMAN GUZMAN,

Defendant and Appellant.

E038375

(Super.Ct.No. FVA19376)

OPINION

APPEAL from the Superior Court of San Bernardino County. Keith D. Davis and Gus Skropos, Judges. Affirmed.

Jeffrey A. Needelman, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Barry Carlton, Supervising Deputy Attorney General, and Sharon L. Rhodes and Kristen K. Chenelia, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Roman Guzman was charged with unlawfully taking a motor vehicle in violation of Vehicle Code section 10851, subdivision (a) (count 1), and receiving stolen property in violation of Penal Code section 496d, subdivision (a) (count 2). Defendant pled guilty to vehicle theft. In exchange, the court dismissed count 2. The court sentenced defendant to six months in jail and three years of probation.

Subsequently, the trial court revoked defendant's probation and sentenced defendant to the upper term of 3 years. On appeal, defendant contends that the trial court erred (1) in failing to reinstate his probation; and (2) in sentencing defendant to the upper term.

Defendant also contends that his sentence to the upper term violated *Blakely v.*

Washington (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] (*Blakely*). For the reasons set forth below, we shall affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND¹

On February 20, 2001, defendant was convicted in Kings County, California, for taking a vehicle without the owner's consent. The court placed defendant on probation for three years with the condition he serve 60 days in jail.

While on probation, on March 23, 2003, the police stopped defendant for the instant offense – driving a vehicle with one of its headlights out and an expired registration. The vehicle had been reported stolen and did not have a key in the ignition.

¹ The facts are taken from the probation reports.

Defendant told the officers that he had borrowed the car from his friend; his friend claimed that the car was not stolen.

Defendant was charged with unlawfully taking a motor vehicle (count 1), and receiving stolen property (count 2). On April 7, 2003, defendant entered a guilty plea to count 1, in exchange for a dismissal of count 2. Defendant was released on his own recognizance until sentencing.

Thereafter, the probation department was unable to contact defendant. The probation department reported that defendant did not appear for the preparation of the presentence investigation or report. On May 12, 2003, the trial court held the first sentencing hearing. Defendant did not appear; a bench warrant issued. On August 7, 2004, police arrested defendant in Fresno and transported him back to San Bernardino.

Defendant stated that he “failed to appear for his original probation interview because soon after his release from custody he became homeless and had to move his family with relatives in northern California, specifically Fresno.” Defendant “then failed to appear for his sentencing hearing because he lacked the funding or the transportation to get back to southern California.” Defendant felt obligated to save for his family and wife. In addition, defendant “did not think that failing to appear would affect his case that much.” Defendant was “remorseful for not attending the hearing but reported that anyone in his shoes at that time would have done the same thing for his family.”

On September 15, 2004, the trial court ordered defendant to serve 180 days in county jail and placed him on three years supervised probation.

Defendant failed to report to probation after he was released from custody on November 21, 2004. The court revoked defendant's probation on March 2, 2005, for the purpose of retaining jurisdiction. On April 23, 2005, the Corcoran Police Department arrested defendant for being under the influence of a controlled substance. On May 11, 2005, defendant was transported to the San Bernardino Central Detention Center.

At the probation revocation hearing on June 3, 2005, defendant admitted to violating his probation for failure to report to his probation officer and failure to cooperate with his probation officer in a plan of rehabilitation, and requested the court reinstate his probation. The probation department filed a supplemental report requesting that the revocation of defendant's probation "remain revoked" because he failed to report to the probation department after being placed on probation. The trial court refused to reinstate probation and sentenced defendant to the upper term of three years in state prison. Defendant appeals.

II

DISCUSSION

A. The Trial Court Properly Denied Defendant's Request to Reinstate Probation

Defendant claims that the trial court erred in failing to reinstate his probation. We disagree.

"Upon finding a probation violation (admitted or otherwise), a court has three options—reinstate probation on the same terms, reinstate it on modified terms, or terminate it and order a commitment to prison." (*People v. Harris* (1990) 226

Cal.App.3d 141, 147.) A trial court's decision to reinstate or deny probation is discretionary, and that decision will not be reversed on appeal absent a showing that the trial court exercised its discretion in an arbitrary or capricious manner. (*People v. Edwards* (1976) 18 Cal.3d 796, 807; *People v. Bolton* (1979) 23 Cal.3d 208, 216.) Thus, "[a] heavy burden is placed on a defendant in attempting to show an abuse of discretion in denying a request for probation." (*People v. Marquez* (1983) 143 Cal.App.3d 797, 803.) However, the concept of "judicial discretion" does not import "a potential without restraint." (*People v. Bolton, supra*, at p. 216.) Discretion, as defined in the pertinent case law, "is . . . 'controlled by sound principles of law, . . . free from partiality, not swayed by sympathy or warped by prejudice' [Citation.]" (*Ibid.*) A court abuses its discretion "whenever the court exceeds the bounds of reason, all of the circumstances being considered." (*People v. Giminez* (1975) 14 Cal.3d 68, 72.) We will not interfere with the trial court's exercise of discretion "when it has considered all facts bearing on the offense and the defendant to be sentenced." (*People v. Vargas* (1975) 53 Cal.App.3d 516, 533.)

Here, we cannot find that the trial court abused its discretion in refusing to reinstate probation. The criteria affecting reinstating probation, including the circumstances in mitigation and aggravation, were presented to the court in the probation report as well as by defense counsel's argument. The court was well aware of defendant's reasons for his noncompliance with the probation terms: (1) Defendant believed his case was to be transferred to Fresno; (2) he received paperwork in English

and did not understand what it said; (3) he has a full time job; (4) he does not use drugs or alcohol; (5) he completed a drug treatment program; (6) he does not have a significant record; (7) he has a family to support; and (8) he did not exhibit any recidivist tendency. The court was also aware that defendant admitted violating two terms of his probation – he failed to report to his probation officer and failed to cooperate with his probation officer in a plan of rehabilitation. Moreover, the court was aware that the Corcoran Police Department had arrested defendant for being under the influence of a controlled substance. Even though defendant had been given opportunities to succeed on probation, defendant had failed to demonstrate a desire to change his noncompliant behaviors as evidenced by the record. The trial court considered defendant’s history, the arguments of counsel, and the probation report submitted at sentencing. It was not required to set out its reasons for either rejecting or minimizing the mitigating factors asserted in the reports and argument. (*People v. Zamora* (1991) 230 Cal.App.3d 1627, 1637.) However, here, the court gave a reasoned explanation for its sentence choice – it stated as follows:

“All right. I have heard counsel’s arguments. The plain simple truth of the matter is that [defendant] has not taken advantage of probation during the period of time it was extended to him. That’s certainly clear from the probation report which was submitted for purposes of today’s hearing. [¶] . . . [¶] I will tell you that failing probation isn’t grounds to have probation granted on yet another occasion, particularly, when, as in this case, there is no reason for the Court to believe that the performance of the defendant on probation would be any better the second time around than it was the first. [¶] I have

nothing before me to give any sort of assurance that [defendant] will take advantage of probation if I were to offer it to him, in as much as he didn't when it was previously offered to him and he accepted it and he advised the Court that he would comply with those terms and conditions of probation.” Nothing in the record suggests that the trial court failed to consider the reasons for defendant's failure to comply with the probation terms and his personal problems.

In the absence of any showing that the court's decision was arbitrary or capricious, we conclude the trial court did not abuse its discretion when it denied defendant's request to reinstate his probation.

B. The Trial Court Properly Sentenced Defendant to the Upper Term of Three Years

Defendant contends that (1) the trial court erred in sentencing defendant to the upper term “in reliance on facts unrelated to the underlying offense or [defendant's] recidivism until the commission of the underlying offense,” and (2) the trial court abused its discretion in sentencing defendant to the upper term under the “sentencing factors enumerated in the Rules of Court.” Defendant also contends that his sentence to the upper term “without any factors in aggravation” violated his Fourteenth Amendment rights to due process and equal protection.

A trial court may impose the upper term when circumstances in aggravation outweigh circumstances in mitigation. (Pen. Code, § 1170, subd. (b); *People v. Nevill* (1985) 167 Cal.App.3d 198, 202; Cal. Rules of Court, rule 4.420(b).) “Selection of the

upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation. The relevant facts are included in the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any further evidence introduced at the sentencing hearing.” (*Ibid.*)

“‘Sentencing courts have wide discretion in weighing aggravating and mitigating factors [citations], and may balance them against each other in “qualitative as well as quantitative terms” [citation] We must affirm unless there is a clear showing the sentence choice was arbitrary or irrational.’ [Citation.]” (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582.) Here, the trial court weighed the aggravating and mitigating factors – the sentence choice was neither arbitrary nor irrational. Moreover, even “[a] single factor in aggravation will support imposition of an upper term.” (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433.)

In this case, defendant contends that the trial court erred in sentencing defendant to the upper term because the “trial court made no mention of aggravating or mitigating factors related to the underlying offense of vehicle theft (Veh. Code, § 10851, subd. (a)), let alone find that aggravating factors outweighed those in mitigation as required to impose the upper term.”

Here, in sentencing defendant to the upper term, the trial court stated: “I agree with the recommendations set forth in the report by the probation officer which include[] the recommendation that the aggravated term of three years for [count 1] be imposed.” In

the second probation report, the probation officer's statement provided a long list of defendant's "prior record of criminal conduct," which included obstructing an officer, vehicle theft, and possession of a controlled substance. Moreover, the probation officer referred the court to the original probation report – "[t]he original presentence investigation indicates circumstances in aggravation including the defendant has a prior record, he has failed grants of probation and was on probation when the present crime was committed." In the original probation report, the circumstances in aggravation were listed as follows: (1) "defendant was on a grant of summary probation when the crime was committed," and (2) "defendant's prior performance on summary probation was unsatisfactory." As for the circumstances in mitigation, it was noted that "no appropriate applications were found." Absent an explicit statement by the trial court to the contrary, it is presumed the court properly exercised its legal duty to consider all possible mitigating and aggravating factors in determining the appropriate sentence. (Cal. Rules of Court, rule 4.409; *People v. Oberreuter* (1988) 204 Cal.App.3d 884, 888, disapproved on another point in *People v. Walker* (1991) 54 Cal.3d 1013, 1022.)

Based on the above, we disagree with defendant's assessment of the evidence. The trial court considered the probation reports submitted for both hearings. Based on the recommendations of the probation officer – which referred to the factors in aggravation and mitigation – the trial court imposed the upper term. Based on the numerous factors in aggravation, we discern no abuse of discretion in the imposition of the upper term.

Moreover, defendant argues that the court erred in imposing the upper term based on defendant's "conduct of not reporting subsequent to being granted probation." Under Rule 4.435, the length of the sentence must be based on circumstances that existed at the time probation was granted and subsequent events may not be considered in selecting the base term. (Cal. Rules of Court, rule 4.435(b)(1).)

Here, the trial court did not rely on defendant's poor performance on probation in sentencing defendant to the upper term. Although the trial court commented on "all of that has taken place," we recognize that the trial court made its decision regarding whether to reinstate probation and what sentence to impose at the same hearing. Therefore, the trial court had to consider defendant's performance on probation during this hearing. The court, however, stated that it was following the probation officer's recommendation in sentencing defendant to the upper term. As provided above, the probation officer provided the court with aggravating and mitigating factors for sentencing defendant.

Therefore, based on the factors in aggravation and no factor in mitigation that were listed in the probation report, which the trial court relied upon, we discern no abuse of discretion in selecting the upper term for count 1.

We now turn to defendant's argument that his sentence to the upper term, "without any factors in aggravation[,] violated his rights of due process and equal protection under the Fourteenth Amendment of the United States Constitution." Again, we disagree.

As stated above, although the trial court did not make any explicit findings as to the aggravating factors in imposing the upper term, absent an explicit statement by the trial court to the contrary, it is presumed the court properly exercised its legal duty to consider all possible mitigating and aggravating factors in determining the appropriate sentence. (Cal. Rules of Court, rule 4.409; *People v. Oberreuter*, *supra*, 204 Cal.App.3d at p. 888.) Hence, because the trial court properly weighed the aggravating and mitigating factors in sentencing defendant, we need not address defendant's constitutional arguments.

C. Defendant's Sentence Did Not Violate His Right to a Jury Trial on Aggravating Facts Used to Impose the Upper Term

Defendant claims that under *Blakely*, *supra*, 542 U.S. 296, the trial court's imposition of the upper term sentence of three years violated his constitutional rights to a jury trial. The California Supreme Court addressed and rejected the precise issue defendant raises in this appeal. (*People v. Black* (2005) 35 Cal.4th 1238.) Under the doctrine of stare decisis, we likewise must reject defendant's claim. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

III

DISPOSITION

The judgment is affirmed.

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/s/ RICHLI

J.

We concur:

/s/ McKINSTER

Acting P. J.

/s/ KING

J.